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No. 00-606

IN THE
Supreme Court of the United States

SUMMIT PROPERTIES, INC., *et al.*,

Petitioners,

v.

CNA HOLDINGS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CNA HOLDINGS, INC. AND CELANESE AMERICAS CORPORATION

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QUESTION PRESENTED

Have Petitioners failed to plead "proximate cause" under 18 U.S.C. § 1964(c), as required by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), where Petitioners have admitted they cannot plead detrimental reliance on any alleged predicate acts of mail and wire fraud, and where Petitioners' alleged injuries are indirect, remote, derivative of alleged harm to third parties, and subject to numerous intervening causal factors?

STATEMENT PURSUANT TO RULE 29.6

Respondent CNA Holdings, Inc., formerly known as Hoechst Celanese Corporation, and Celanese Americas Corporation, formerly known as Hoechst Corporation, are both indirect, wholly owned subsidiaries of Celanese AG. Celanese AG is a publicly traded company.

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STATEMENT OF THE CASE

By this case, Petitioners seek to federalize state products liability law. Under the guise of civil RICO, Petitioners claim that end users of products who never heard or detrimentally relied upon alleged misrepresentations by remote, raw material suppliers may nevertheless bring federal racketeering claims seeking treble damages and attorneys' fees. The United States District Court for the Southern District of Texas and the United States Court of Appeals for the Fifth Circuit refused Petitioners' effort to "establish" this novel "federal products liability scheme," holding that Petitioners' claims fail wholly to satisfy the proximate cause requirements of civil RICO set forth by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). [R. 1332-37]; *Summit Properties, Inc., et al. v. Hoechst Celanese Corp., et al.* ("*Summit*"), 214 F.3d 556, 557, 562 (5th Cir. 2000). Respondents respectfully urge the same result here.

Petitioners — owners of apartments and other types of multi-unit dwellings allegedly containing polybutylene (or PB) plumbing — seek damages from numerous Respondents, including CNA Holdings, Inc., formerly known as Hoechst Celanese Corporation, and Celanese Americas Corporation, formerly known as Hoechst Corporation (collectively "Celanese"), under various theories of liability, alleging that polybutylene plumbing is defective. [R. 914]. Petitioners did not bring suit against the builders or sellers of their properties. Rather, Petitioners sued only some of the manufacturers of the plumbing, and three raw material suppliers — Shell Oil Company d/b/a Shell Chemical Company ("Shell"), E.I. duPont de Nemours and Company, and Celanese — which provided resins used by others in the

manufacture of some of the components found in some types of polybutylene plumbing. [R. 912-13]. Celanese supplied a raw material, known as Celcon, which was used by certain manufacturers to fabricate insert fittings that join pieces of pipe in some types of polybutylene plumbing. [R. 908, 912-13].

In an effort to support a federal civil RICO claim, Petitioners allege that Respondent Shell organized the other Respondents into an enterprise, which, among other things, used the mail and wires to make material misrepresentations to unidentified "code bodies, builders, developers, and plumbers throughout the United States" regarding the suitability of polybutylene plumbing. [R. 889]. Petitioners do not, because they cannot, plead that they ever heard, saw, or otherwise received any of these alleged misrepresentations, much less relied on them to their detriment.

Respondents moved to dismiss Petitioners' claims on the grounds that, among other things, Petitioners could not plead detrimental reliance on the alleged misrepresentations, and thus could not satisfy the proximate cause requirements of civil RICO. [R. 1070, 1099, 1126, 1135, 1143, 1162, 1169]. In response, Petitioners argued that reliance was not required, and instead rested their claim essentially on a "fraud on the market" theory. [R. 1996-98].

The district court granted Respondents' motions, dismissing Petitioners' civil RICO claims against all Respondents with prejudice, and dismissing Petitioners' pendent state law claims against all Respondents without prejudice. [R. 1332, 1337]. In so ruling, the District Court held that "absent an allegation that Defendants made material

misrepresentations to Plaintiffs and that Plaintiffs relied on the mail and wire fraud on which the civil RICO claims are predicated, Plaintiffs cannot satisfy the proximate causation requirement for purposes of civil RICO." [R. 1334].

The Fifth Circuit affirmed the dismissal of Petitioners' civil RICO claims, holding that Petitioners failed to plead "proximate cause" under civil RICO as required by this Court in *Holmes*. *See Summit*, 214 F.3d at 557-58. Rejecting the same "fraud on the market" theory Petitioners urge to this Court, the Fifth Circuit held that where, as here, "civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is a commonsense liability limitation." *Id.* at 562. Because Petitioners conceded that they "did not detrimentally rely on any of the [Respondents'] allegedly fraudulent misrepresentations that served as the basis for the RICO claims," the Fifth Circuit ruled that the claims were properly dismissed. *Id.* at 558, 562.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT PETITIONERS HAVE FAILED TO PLEAD PROXIMATE CAUSE UNDER CIVIL RICO

To state a civil RICO claim under Section 1964(c), Title 18, United States Code, plaintiffs must plead that they have been injured in their business or property "by reason of" the alleged predicate act. *See* 18 U.S.C. § 1964(c); *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985); *Summit*, 214 F.3d at 559. To satisfy the "by reason of" requirement, this Court held in *Holmes* that civil RICO plaintiffs must plead (and ultimately prove) proximate

causation, *i.e.*, that they were the "directly" injured parties. *See* 503 U.S. at 268. This proximate cause requirement establishes a legal limit on a person's responsibility, even for alleged wrongful conduct. *See id.* at 268.

Following the proximate cause holding of this Court in *Holmes* and the holdings of every other circuit court to have addressed the issue, the Fifth Circuit ruled that where, as here, civil RICO damages are sought for alleged injuries resulting from mail or wire fraud, a showing of reliance by the plaintiff is a "commonsense liability limitation." *Summit*, 214 F.3d at 562. Given that Petitioners admitted they could not make such a showing, the Fifth Circuit affirmed dismissal of Petitioners' claims. *Id.* at 562.

Contrary to Petitioners' claims, the Fifth Circuit's ruling is fully consistent with this Court's ruling in *Holmes*, including the three factors outlined in that case for determining whether civil RICO plaintiffs have pled properly a direct injury, and thus stated proximate cause: (1) the directness of the purported injury; (2) the difficulty of apportioning treble damages among other potential plaintiffs; and (3) the possibility of other plaintiffs vindicating the goals of civil RICO. *See* 503 U.S. at 269-71; *see also Callahan v. A.E.V., Inc.*, 182 F.3d 237, 264 (3d Cir. 1999) (listing factors). As shown below, Petitioners' indirect and remote civil RICO claims fail at each level of the *Holmes* analysis. *See Holmes*, 503 U.S. at 269-70.

A. Petitioners Here Are Not The Directly Injured Parties

Petitioners' civil RICO claims fail the "directness" factor of *Holmes* for at least two reasons. First, the claims are indirect and remote, as they rest entirely on purported

misrepresentations to third parties many steps removed from Petitioners and their alleged injuries. Second, numerous causes intervene between Respondents' alleged misrepresentations and Petitioners' purported injuries.

1. Petitioners' claims are not direct

As Justice Holmes observed in *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918), "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." For that reason, this Court has held that injuries merely derivative of harm to a third party, such as those alleged here, are too indirect and remote to state a civil RICO claim. *Holmes*, 503 U.S. at 268-69 ("Thus, a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover.") (citing 1 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 55-56 (1883)). Following this Court's rulings, courts have routinely rejected indirect and remote claims under civil RICO, such as those asserted here. *See, e.g.*, *Steamfitters Local Union v. Phillip Morris, Inc.*, 171 F.3d 912, 921 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000) (healthcare funds' civil RICO claims too indirect and remote to recover for alleged harm to smokers); *Laborers Local 17 v. Phillip Morris, Inc.*, 191 F.3d 229, 239 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000) (healthcare funds' civil RICO claims for injuries (payment of medical benefits) flowing from tobacco companies' alleged fraudulent misrepresentations to individual smokers held too remote); *Callahan*, 182 F.3d at 264 (local beer distributorships' complaint of competitive disadvantage resulting from defendants' misrepresentations to the Pennsylvania Liquor Control Board held too remote under civil RICO);

Bivens Gardens Office Bldg. v. Barnett Banks, 140 F.3d 898, 906 (11th Cir. 1998) (losses suffered by company's stakeholders as a result of racketeering activity against the company held too remote under civil RICO); *National Enters., Inc. v. Mellon Fin. Servs. Corp.*, 847 F.2d 251, 254 (5th Cir. 1988) ("In a RICO case an indirectly injured party should look to the recovery of the directly injured party, not to the wrongdoer for relief.") (citation omitted); *Dow Chem. Co. v. Exxon Corp.*, 30 F. Supp. 2d 673, 696 (D. Del. 1998) (plaintiff's claims of injury flowing from defendants' fraudulent misrepresentations to the Patent and Trademark Office held too remote under civil RICO).

Petitioners here admit that all of the alleged misrepresentations were made not to them, but to third parties, *i.e.*, code bodies, developers, builders, and plumbers. [R. 889]. Petitioners further admit that they never heard, read, or otherwise received, much less relied to their detriment upon, these alleged misrepresentations. *See Summit*, 214 F.3d at 560 n.15. In so doing, Petitioners concede that they cannot establish that they were the directly injured parties, as the law requires. Based on these admissions, the Fifth Circuit in *Summit* rejected Petitioners' civil RICO claims as too indirect and remote to satisfy the proximate cause requirements of *Holmes*. *See* 214 F.3d at 557-59, 562; *see also Holmes*, 503 U.S. at 268 ("Allowing suits by those injured only indirectly would open the door to 'massive and complex damages litigation[, which would] not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble damages suits.' ") (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 545 (1983)); *Laborers Local 17*, 191 F.3d at 235 ("[*Holmes*] tells us that to plead a direct injury is a key element for establishing proximate cause. . . . Thus the other traditional rules [of proximate cause] are

additional elements, not substitutes for alleging (and ultimately, showing) a direct injury.").

2. There are numerous intervening causes between the alleged misrepresentations and the purported damages

In *Holmes*, this Court ruled that proximate cause cannot be properly pled where, as here, numerous intervening acts and decisions of third parties occurred between the alleged actions of Respondents and Petitioners' purported injuries: "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation as distinct from other, independent factors." *See* 503 U.S. at 269. Based on this holding, courts consistently have dismissed civil RICO claims where numerous causal factors intervene between the alleged harm and the purported damages. *See, e.g.*, *Steamfitters Local Union*, 171 F.3d at 933 (holding healthcare funds' RICO claims too remote where district court would have to determine extent to which several possible intervening causes affected the funds' damages); *Callahan*, 182 F.3d at 264 (holding existence of numerous possible intervening causes rendered plaintiffs' RICO claims too remote); *Laborers Local 17*, 191 F.3d at 240 ("it becomes difficult to distinguish among the multitude of factors that might have affected the damages."); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1312 (9th Cir. 1992) (finding no "direct relationship" between defendants' conduit scheme and plaintiffs' failure to earn certain profits on subcontracts because intervening inability of prime contractors to secure the contracts was direct cause of plaintiffs' injuries).

Here, as Petitioners all but concede, there are numerous intervening events between the alleged misrepresentations by Respondents to third parties and Petitioners' claimed injuries. For example, as for the code bodies, there are numerous intervening causal factors, such as independent investigations, inquiries, tests, and economic concerns, which may have influenced the decision to grant or not grant approval for polybutylene plumbing in a particular jurisdiction. Likewise, with respect to developers, builders, and plumbers, factors such as cost, product availability, ease of installation, and construction requirements may have influenced their purchasing decisions, wholly apart from the alleged misrepresentations by Respondents. In its ruling in this case, the Fifth Circuit recognized that such intervening factors jeopardized Petitioners' ability to establish even "but-for" causation. *See Summit*, 214 F.3d at 560 n.19 ("If the relevant decisionmakers knew the limitations of the product but would have bought it anyway because of its low price, for example, the fraud would not have been a 'but-for' cause of the plaintiffs' damages.").[1]

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1. The Texas Supreme Court decision in *Amstadt v. United States Brass Corporation*, 919 S.W.2d 644, 651 (Tex. 1996), a polybutylene plumbing case brought under the Texas Deceptive Trade Practices Act, illustrates the eroding effect that these intervening acts and decisions have on the chain of causation. There, property owners alleged, like here, that Shell and Celanese made misrepresentations to code bodies and builders, but the court rejected the claim that the alleged misrepresentations were necessarily the cause of the property owners' injuries, stating: "As was the case with Celanese, the facts do not support the conclusion that Shell's misrepresentations were made in connection with the relevant consumer transactions, the purchase of homes. . . . [A]ny information provided by Shell was subject to *independent evaluation by builder code officials and by homebuilders*." *Id.* (emphasis added).

B. Petitioners' Indirect And Remote Claims Fail Due To The Difficulty Of Apportioning Damages At Each Level Of Alleged Injury

Petitioners' indirect and remote civil RICO claims also fail the second factor of the *Holmes* analysis because of the overwhelming difficulty of apportioning damages among other potential plaintiffs in order to obviate the risk of multiple recoveries. *See Holmes*, 503 U.S. at 269. In the present case, each tier of the purchasing chain — including developers, builders, plumbers, and Petitioners — has duplicate claims to recover for the allegedly defective plumbing. The creation of formulas to allocate such losses among the various tiers of potential claims would be essentially impossible, and thus in conflict with the Court's holding in *Holmes*.

Contrary to Petitioners' arguments [Petition at 20], resolution of this factor does not turn on whether the developers, builders, plumbers, and others have brought or will bring suit to recover for these duplicative damages, but whether there is a possibility that they may bring suit. *See, e.g.*, *Callahan*, 182 F.3d at 265 ("We do not think the question [of] whether the defendants' fraud proximately caused the plaintiffs' injuries can turn on whether some other potential claimants have filed suit. . . . [As] we recognized in *Steamfitters*[,] the fact that smokers themselves could bring claims against the tobacco companies was relevant to determining proximate causation with respect to the funds, even though the smokers were in fact unlikely to bring claims on their own.") (citing 171 F.3d at 933); *Laborers Local 17*, 191 F.3d at 240 ("Other remote payors like the employers or health insurers with whom the Funds may contract might

bring suit. . . . Thus, a possibility of duplicative recoveries exists.").[2]

C. The Goals Of RICO Can Be Vindicated By More Direct Means Than By Allowing Petitioners' Remote Claims To Proceed

Petitioners' claims also fail the final factor under *Holmes* because the central focus of RICO — deterring unlawful conduct — can be vindicated by other, more direct means. *See Holmes*, 503 U.S. at 269-70. Specifically, Petitioners have pled that the alleged RICO fraud was directed not to them, but to unidentified developers, builders and plumbers. [R. 889]. Under *Holmes*, the goals of RICO can be vindicated, if at all, by those allegedly directly injured parties. *See Holmes*, 503 U.S. at 269-70; *see also Callahan*, 182 F.3d at 265 ("Where a more directly affected party is available to vindicate the public interest in enforcing the law, we have less need to stretch the limits of proximate causation in RICO cases.").

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2. Petitioners also argue that the single satisfaction rule would protect Celanese and the other Respondents against the possibility of duplicate recoveries. [Petition at 20 n.13]. However, this argument was specifically rejected by the Second Circuit in *Laborers Local 17*, because courts would still be forced to "adopt complicated rules apportioning damages" among the various entities. *See* 191 F.3d at 240 (quoting *Holmes*, 503 U.S. at 269); *see also Callahan*, 182 F.3d at 264 (holding that potential claims by plaintiffs and beer wholesalers for the same economic loss negated proximate cause); *Steamfitters Local Union*, 171 F.3d at 933 (finding lack of proximate cause because "a court adjudicating the Funds' RICO claims would need to consider the appropriate apportionment of damages between smokers and others such as the Funds who suffered economic losses as a result of the tobacco companies' alleged fraudulent acts.").

In response, Petitioners argue that most of these other parties — the developers, builders, and plumbers — are not likely to file suit. [Petition at 20]. However, Petitioners' argument misstates the issue:

> [The] circumstance [where the more directly injured parties have not brought suit] is irrelevant to determining whether the plaintiffs' injuries are too remote from the defendants' actions to be a proximate cause for the RICO claim. The post-injury actions of intervening parties cannot make the plaintiffs' losses more or less of a direct result of the defendants' actions. *The only question is whether these intervening parties are the ones that possibly could take steps to deter illegal activity as contemplated in Holmes.*

Callahan, 182 F.3d at 265 n.21 (emphasis added). Thus, that the allegedly directly injured parties (*e.g.*, code bodies, developers, builders, and plumbers) have not brought suit is immaterial to this analysis.

II. THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER UNITED STATES COURT OF APPEALS ON THE SAME MATTER

Notwithstanding Petitioners' arguments [Petition at 6-17], the Fifth Circuit's decision does not conflict with any decision of this Court or of any other circuit court on the same matter. To the contrary, as shown below, every circuit court to have recently addressed the issue has held that detrimental reliance by the plaintiff is required to show

proximate cause in civil RICO actions involving mail or wire fraud.

A. The Second Circuit Requires Reliance

In *Metromedia Co. v. Fugazy*, the Second Circuit held expressly that "in the context of an alleged RICO predicate act of mail fraud . . . [the] plaintiff is required to demonstrate that the defendant's misrepresentations were relied upon." 983 F.2d 350, 368 (1992).[3] Attempting to avoid the clear holding of *Metromedia Co.*, Petitioners argue that the pre-*Holmes* decision in *County of Suffolk v. Long Island Co.* ("*Suffolk*"), 907 F.2d 1295 (2d Cir. 1990), finds reliance by third parties, instead of plaintiffs, is sufficient under civil RICO. Petitioners are not correct, as *Suffolk* did not reach the issue of reliance by plaintiff in rejecting the civil RICO claims in that case.

In *Suffolk*, ratepayers claimed that a group of utility defendants defrauded the New York State Public Service Commission ("PSC") into approving higher rates. *See* 907 F.2d at 1299-1300. The Second Circuit affirmed the trial

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3. Petitioners attempt to limit the import of this decision, as well as two other decisions discussed *infra*, by arguing that their application is limited to "simple, two-party misrepresentation cases." [Petition at 9, 12, 13]. Contrary to Petitioners' argument, none of these cases so hold. To the contrary, all three cases stand clearly for the proposition that proximate cause under civil RICO based on fraud requires detrimental reliance. *See Metromedia Co.*, 983 F.2d at 368; *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 741 (3d Cir. 1996); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991). Moreover, as evidenced by the 59 page decision in *Pelletier*, these decisions are anything but "simple, two-party misrepresentation" cases. *See* 921 F.2d 1465.

court's dismissal of plaintiff's civil RICO claims. *Id.* at 1312. In so ruling, the Second Circuit recognized that plaintiff could not even show reliance by the PSC, and thus had no reason to address the issue of reliance by the ratepayers. *See id.* at 1311-12.[4]

B. The Third Circuit Requires Reliance

The Third Circuit likewise requires detrimental reliance in civil RICO actions predicated on fraud to show proximate cause. For example, in *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.* ("*Ideal*"), plaintiff sued several processed milk suppliers, alleging that they engaged in a mail and wire fraud scheme to overcharge plaintiff for dairy products in violation of civil RICO. 90 F.3d 737, 741 (3d Cir. 1996). Because, as in this case, plaintiff was unable to plead and prove that it detrimentally relied upon any of the alleged instances of mail and wire fraud, the Third Circuit, affirming the district court's dismissal, held that plaintiff's failure to plead and prove detrimental reliance warranted dismissal of its RICO claims. *Id.*

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4. Petitioners also cite *Cement and Concrete Workers Dist. Council v. Lollo*, 148 F.3d 194 (2d Cir. 1988) and *Standardbred Owners Ass'n v. Roosevelt Raceway*, 985 F.2d 102 (2d Cir. 1993), as purported support for their alleged circuit conflict. [Petition at 13-14]. Neither case supports Petitioners. *Lollo* did not even involve civil RICO, and *Standardbred Owners Ass'n* involved misrepresentations that plaintiffs received and relied upon to their detriment. *See* 985 F.2d at 103. In *Standardbred Owners Ass'n*, plaintiffs purchased horse racing equipment and made other expenditures in reliance upon misrepresentations that defendants would continue to operate a horse racing track. *Id.* at 104-05. This holding is in complete harmony with the dictates of *Holmes*. Indeed, the Second Circuit recently acknowledged that the holding in *Standardbred Owners Ass'n* was based on plaintiffs' direct reliance on defendants allegedly fraudulent statements. *See Laborers Local 17*, 191 F.3d at 237-38.

In an attempt to avoid the holding in *Ideal*, Petitioners cite the pre-*Holmes* RICO decision in *Environmental Tectonics v. W.S. Kirkpatrick & Co., Inc.*, 847 F.2d 1052 (3d Cir. 1988). *Environmental Tectonics*, however, has no application to this case, as it was a commercial bribery action. Given that bribery claims do not require reliance, the case unsurprisingly does not mention, much less consider, whether "reliance" is a proximate cause requirement in civil RICO claims based on fraud. *See id.*

C. The Fourth Circuit Requires Reliance

Contrary to Petitioners' claim, the Fourth Circuit clearly holds that detrimental reliance is required to show proximate cause in a civil RICO action based on mail and wire fraud. For example, in *Brandenburg v. Seidel*, 859 F.2d 1179, 1188-90 (4th Cir. 1988), the court held that civil RICO plaintiffs who base their claims on predicate acts of mail or wire fraud must allege both that they detrimentally relied on the fraudulent statements and that the fraudulent statements were the proximate cause of the alleged injury to their property or business. In cases decided since *Brandenburg*, the Fourth Circuit has uniformly required a showing of detrimental reliance in civil RICO actions predicated on mail or wire fraud. *See Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 338-39 (4th Cir. 1996) (holding that plaintiffs failed to state proximate cause under civil RICO because they did not plead detrimental reliance); *Mid-Atlantic Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 264 (4th Cir. 1994) (remanding for, among other things, resolution of reliance issue); *Caviness v. Derand Res. Corp.*, 983 F.2d 1295, 1305 (4th Cir. 1993) (noting that a showing of reliance on the predicate act of fraud ensures the existence of a "direct relation between the injury asserted and the injurious conduct

alleged."); *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 805 F. Supp. 1277, 1291-92 (D.S.C.), *aff'd*, 998 F.2d 1009 (4th Cir. 1992) (proximate cause not established where "alleged predicate acts were all directed at third parties").

Notwithstanding the Fourth Circuit's clear and consistent mandates regarding reliance, Petitioners attempt to manufacture a conflict by contending erroneously that *Chisolm* is in "flat contradiction" with *Summit*. [Petition at 16]. Petitioners are mistaken. Indeed, the Fourth Circuit's ruling on this point in *Chisolm* could not have been more clear, as the court expressly stated that "where fraud is alleged as a proximate cause of the injury, the fraud must be a 'classic' one. In other words, the plaintiff must have justifiably relied, to his detriment, on the fraud." 95 F.3d at 337.

In *Chisolm*, plaintiffs alleged that defendants sent fraudulent documents through the mail, but failed to allege that they relied upon them to their detriment. *Id.* at 333. As such, the district court dismissed plaintiffs' RICO claims for failure to plead detrimental reliance. *Id.* On appeal, the Fourth Circuit reiterated its long-standing requirement that civil RICO plaintiffs plead and prove detrimental reliance, stating:

> where the predicate act giving rise to civil liability under RICO was alleged to have been mail fraud, prospective plaintiffs must, in order to demonstrate standing to sue, allege both that they detrimentally relied in some way on the fraudulent mailing, and that the mailing was a proximate cause of the alleged injury to their business or property.

Id. at 337. The court remanded the case with instruction that the plaintiffs be given an opportunity to cure their reliance pleading "defect." *Id.* Upon remand, the plaintiffs amended their complaint and specifically pled detrimental reliance upon the alleged acts of mail fraud. *Chisolm v. TranSouth Fin. Corp.*, No. 97-1970, 1998 WL 709311, at *2 (4th Cir. Oct. 5, 1998) (unreported).

In short, *Chisolm* is entirely consistent with the instant action. Both cases held that pleading and proof of reliance were a necessary prerequisite to show proximate cause in a civil RICO claim based on fraud. The only difference is that in *Chisolm*, plaintiffs expressly alleged receipt of, and detrimental reliance upon, the acts of mail fraud. *See Chisolm*, 95 F.3d at 334; *Chisolm*, 1998 WL 709311, at *2. In stark contrast, Petitioners here concede that they "did not rely on anything [Respondents allegedly] said or published in purchasing their properties." [Petition at 7a].[5]

D. The Sixth Circuit Requires Reliance

As Petitioners concede, the Fifth and Sixth Circuits are consistent in requiring detrimental reliance to show

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5. Petitioners also cite *John C. Holland Enters., Inc. v. J.P. Mascaro & Sons, Inc.*, 653 F. Supp. 1242 (E.D. Va.), *aff'd*, 829 F.2d 1120, No. 87-2011, 1987 WL 38095, at *1 (4th Cir. 1987) (unreported), for the erroneous proposition that "the Fourth Circuit upheld a RICO claim . . . squarely in conflict with the Fifth Circuit's blanket rule." [Petition at 14]. In that case, however, the Fourth Circuit did not analyze, rule upon, or otherwise consider any RICO claims. *See John C. Holland Enters., Inc. v. J.P. Mascaro & Sons, Inc.*, 1987 WL 38095, at *1. Although the case initially involved a civil RICO claim, plaintiff "voluntarily dismissed" the claim before appeal to the Fourth Circuit. *Id.*

proximate causation in civil RICO actions predicated on mail or wire fraud. [Petition at 24]. The Sixth Circuit's "reliance" requirement is set forth clearly in *Central Distributors, Inc. v. Conn*, where the court affirmed the dismissal of civil RICO claims based on mail and wire fraud because the plaintiff was unable to present evidence that it received and relied upon any misrepresentations or omissions of material facts from the defendants. *See* 5 F.3d 181, 184 (6th Cir. 1993) ("the defendant must make a false statement or omission of fact to the plaintiff to support a claim of wire fraud or mail fraud as a predicate act for a RICO claim."); *see also Kenty v. Bank One*, 92 F.3d 384, 390-91 (6th Cir. 1996) (affirming dismissal of civil RICO claims based on mail fraud because plaintiffs were unable to state with particularity a misrepresentation made to them by the defendants).

E. The Seventh Circuit Requires Reliance

Petitioners also concede that the Fifth and Seventh Circuits are consistent in requiring detrimental reliance on alleged misrepresentations that are the basis of a civil RICO claim. [Petition at 23]. The Seventh Circuit's rulings on this issue are set forth unambiguously in *Reynolds v. East Dyer Development Company*, where it affirmed the dismissal of civil RICO claims predicated on mail or wire fraud because plaintiffs were unable to demonstrate that they received and relied upon any alleged misrepresentations or omissions by the defendants. 882 F.2d 1249, 1254 (7th Cir. 1989).

F. The Eighth Circuit Requires Reliance

In *Appletree Square Ltd. Partnership v. W.R. Grace & Co.* ("*Appletree*"), the Eighth Circuit confirmed that, to satisfy proximate cause, civil RICO plaintiffs must plead

and prove reliance upon alleged predicate acts of mail or wire fraud. 29 F.3d 1283 (8th Cir. 1994). The facts of *Appletree* are strikingly similar to the instant case, as *Appletree* also involved an attempt to transform a garden variety products liability claim into a civil RICO action. *See id.* at 1284. There, plaintiff, an owner of an office building, instituted a civil RICO action against a remote supplier of an asbestos fireproofing product, but plaintiff never contended that it relied on any misstatements or misrepresentations of the defendants in purchasing the building. *Id.*[6] The Eighth Circuit affirmed dismissal of the case, holding:

> Because Appletree has not produced any evidence to show it detrimentally relied on any of the alleged misrepresentations in its purchase of the building, it has failed to establish the existence of a genuine issue of material fact as to whether the alleged misrepresentations proximately caused its claimed injuries and thus lacks standing to bring its civil RICO claims.

29 F.3d at 1287.

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6. In *Appletree*, the owner attempted (as do Petitioners in this case) to establish detrimental reliance through a "fraud-on-the-market" theory. *See id.* at 1286. The court rejected this contention, properly noting that the "fraud-on-the-market" theory of reliance is reserved for securities fraud cases, and has no applicability to a product liability case. *Id.* The *Summit* court similarly rejected Petitioners' effort here to avoid dismissal by reference to this inapplicable doctrine, holding: "[n]o court has accepted the use of this theory outside of the context of securities fraud . . . ." 214 F.2d at 561.

Unable to distinguish *Appletree*, Petitioners label the decision an "anomaly," and proceed to discuss three other decisions which they contend are "more typical" examples of Eighth Circuit law on proximate cause under civil RICO. [Petition at 10]. As shown below, however, none of those decisions support Petitioners and none are inconsistent with either *Appletree* or *Summit*.

Petitioners first rely upon *Atlas Pile Driving Co. v. DiCon Financial Co.* ("*Atlas*"), a pre-*Holmes* decision which does not even address proximate causation under civil RICO. The *Atlas* decision does discuss the statutory requirements for criminal mail and wire fraud, but that issue is not relevant to this case. 886 F.2d 986, 990-93 (8th Cir. 1989). As the *Summit* court stated, the issue of the statutory requirements for mail or wire fraud are "distinct" from proximate cause requirements under civil RICO. *See* 214 F.3d at 559.

Similarly unavailing is Petitioners' citation to *United HealthCare Corporation v. American Trade Insurance Co.* ("*United HealthCare*"), 88 F.3d 563 (8th Cir. 1996). This case does not address reliance within the context of establishing proximate cause under civil RICO, and, as with *Atlas*, the discussion of whether reliance is a statutory requirement for criminal mail or wire fraud is not relevant to the issue of proximate cause.[7] Finally, it is clear from the facts in *United HealthCare* that the mail fraud alleged included the receipt of purportedly fraudulent insurance

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7. *See United HealthCare*, 88 F.3d at 571 n.5; *Summit*, 214 F.3d at 559 n.14 ("In Akin, however, this court noted only that reliance is not an element of an underlying mail or wire fraud violation. . . . Whether the plaintiff's damages were proximately caused by reason of such violation was not at issue.").

certificates mailed by defendants. *Id.* at 571. In *United HealthCare*, the defendants, insurance "purchase groups" and related entities, accepted premiums from various Health Maintenance Organizations ("HMOs"), but failed to forward the premiums to the insurance companies. *See id.* at 567. Instead, the defendants misappropriated the premiums and sent false insurance certificates to the HMOs, which would likely resolve the reliance issue. *Id.* at 567-68, 571.

Petitioners also rely upon *Bieter Company v. Blomquist*, 987 F.2d 1319 (8th Cir. 1993); however, that case involved a bribery claim and thus neither mentioned nor considered whether detrimental reliance upon predicate acts of mail or wire fraud is necessary to state a civil RICO claim.

G. The Ninth Circuit Requires Reliance

Although not addressed by Petitioners, the Ninth Circuit also requires reliance on alleged misrepresentations to state proximate cause in civil RICO cases based on mail and wire fraud. For example, in *Forsyth v. Humana, Inc.*, the Ninth Circuit affirmed the dismissal of a civil RICO action predicated on mail and wire fraud where plaintiffs were unable to establish that they relied on any specific misrepresentations regarding the calculation of insurance premiums by the defendants. *See* 114 F.3d 1467, 1481 (9th Cir. 1997); *see also MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504-05 (9th Cir. 1986) (holding that plaintiff's mail fraud and racketeering charges were "without foundation" because it could not state reliance).

H. The Tenth Circuit Requires Reliance

The Tenth Circuit, consistent with the instant case, also requires plaintiffs to plead detrimental reliance in order to

state a civil RICO claim based on mail and wire fraud, and Petitioners do not contend otherwise. Application of the Tenth Circuit's rule is found in *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, where the court held that plaintiff, a manufacturer of evaporative coolers, could not state a civil RICO claim based on mail and wire fraud because it failed to plead detrimental reliance on any fraudulent misrepresentations by the defendant, a competitor. *See* 939 F.2d 887, 892 (10th Cir. 1991).

I. The Eleventh Circuit Requires Reliance

The Eleventh and Fifth Circuits are wholly consistent with respect to "proximate cause" in civil RICO cases involving mail or wire fraud. For example, in *Pelletier v. Zweifel*, the Eleventh Circuit held that "when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of the scheme." 921 F.2d 1465, 1499-1500 (1991).

Since *Pelletier*, the Eleventh Circuit has routinely required reliance, and has also held that alleged instances of mail and wire fraud directed to third parties, such as those in the instant case, are insufficient to satisfy RICO proximate cause under civil RICO. *See All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc.*, 135 F.3d 740, 745 n.10 (11th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999) (reliance required because a "RICO plaintiff must prove he was injured by the RICO defendant's deception and fraud."); *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) ("Because the misrepresentations the defendants are said to have made were directed to [third parties], not [the plaintiff], [plaintiff] lacks standing under

section 1964(c) to prosecute a claim based on such misrepresentations.").

Faced with this authority, Petitioners cite several cases which they claim conflict with *Pelletier* and its progeny [Petition at 11-12]. Petitioners are not correct. First, *Taffet v. Southern Co.*, which was decided before *Holmes*, has nothing to do with the issue in this case. That case involved ratepayers' claims that the defendants defrauded public utility commissions into approving elevated utility rates, which were then passed on to consumers. *See* 930 F.2d 847, 856 (11th Cir. 1991). Petitioners strangely fail to refer to the Eleventh Circuit's *en banc* decision in *Taffet*, 967 F.2d 1483 (11th Cir. 1992), but rather cite to an earlier, vacated decision of a three judge panel. [Petition at 11-12]. As the *en banc* decision made clear, however, *Taffet* did not address the proximate cause and reliance matters at issue in this case. *See* 967 F.2d at 1494. Rather, on reconsideration, the Eleventh Circuit, reversing its earlier decision, held that the plaintiffs failed to allege a cognizable injury under civil RICO due to application of the "filed rate doctrine," which has no application here. *See id.*

Petitioners also rely on *Cox v. Administrator U.S. Steel & Carnegie*, but that case involved a bribery claim, not mail or wire fraud claims, and thus the court did not consider "reliance" as a proximate cause requirement under civil RICO. *See* 17 F.3d 1386, 1398-1403 (11th Cir. 1994). *Cox* did, however, cite approvingly to both *Pelletier* and *Brandenburg*, which, as discussed above, both held that detrimental reliance is required in civil RICO actions involving mail or wire fraud. *See* 17 F.3d at 1396, 1399. Petitioners additionally claim that the instant case conflicts with *All Care Nursing Service, Inc.*, but that case reaffirmed

the reliance holding set forth in *Pelletier*. *See* 135 F.3d at 745 n.10.

J. There Is No Conflict With The District of Columbia Circuit

Petitioners essentially concede that the District of Columbia Circuit has not yet decided a case in which the issue was presented as to whether detrimental reliance upon predicate acts of mail or wire fraud is necessary to show proximate cause in civil RICO cases. Nevertheless, Petitioners attempt to manufacture a conflict between the Fifth and District of Columbia Circuits by relying on *BCCI Holdings (Luxembourg), S.A. v. Khalil* ("*BCCI*"), which involved a scheme by several defendants to misappropriate almost four hundred million dollars from an international bank. 214 F.3d 168, 169-70 (D.C. Cir. 2000). Petitioners' reliance on *BCCI* is misplaced, as that decision did not involve detrimental reliance under civil RICO in a case involving mail or wire fraud. *See id.* at 173-74.

CONCLUSION

Following the proximate cause requirements for civil RICO set forth by this Court in *Holmes*, circuit courts, including the Fifth Circuit in this case, have uniformly held that a plaintiff must plead and prove detrimental reliance on the alleged predicate acts of mail and wire fraud. Petitioners here admit they cannot plead or prove detrimental reliance on the alleged fraud. As such, the dismissal of their civil RICO claims was proper and should not be reviewed further. To hold otherwise would, as this Court recognized in *Holmes*, open the door to " 'massive and complex damages litigation[, which would] not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble damages suits.' " *See* 503 U.S. at 274 (citation omitted). For these reasons, Celanese respectfully requests that the Court deny the Petition for Writ of Certiorari.

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